APPEAL NO. 92114
FILED MAY 4, 1992

A contested case hearing was held in _____, Texas, on February 19, 1992, with (hearing officer) presiding as hearing officer. The sole disputed issue was whether or not appellant sustained an injury to his right shoulder in the course and scope of his employment while lifting a bucket of paint at work. The hearing officer, after first specifically finding as not credible the version of the facts as testified to by both appellant and his wife, found the appellant failed to establish by a preponderance of the evidence that he was injured in the course and scope of his employment on (date of injury). He concluded that appellant was not entitled to benefits under the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant challenges the sufficiency of the evidence to support the above-mentioned findings and conclusion.

DECISION

We affirm the decision of the hearing officer. The evidence is factually sufficient to support his findings of fact, conclusions of law, and his decision that appellant is not entitled to benefits under the 1989 Act.

Appellant testified that he had been employed for approximately six months as a sandblaster/painter for (Employer) and was working at a refinery site when, on Wednesday, (date of injury), he injured his right shoulder carrying or lifting five-gallon containers of paint up and down some stairs. Apparently, appellant was carrying paint in the five-gallon container, referred to as a paint pot, to other employees who were painting a "vessel." He said he had been working closely that afternoon with SC who assisted him with the carrying of the paint pot on the two or three occasions they carried it up and down some stairs. According to appellant, he hurt his right shoulder at about 3:30 p.m. and continued working until approximately 4:10 p.m. that day when the shift was concluded. On the following Thursday and Friday, August 15th and 16th, appellant said his shoulder hurt too bad to go to work and that he instructed his wife, Mrs. C, to call the Employer for him. On the following Monday, August 19th, appellant said he went to Employer to report his accident because "they wouldn't believe my wife." He told his foreman, LA, about his injury and the latter arranged for appellant to be taken to a doctor at the (clinic). After leaving the clinic he was returned to work and finished his shift. On the next day, he stayed home because he was drowsy from the medication given him the previous day and because the doctor had told him to sleep all day. His shoulder still hurt. On Wednesday, August 21st, he said he went to work because Employer promised to send him back to the doctor. However, he was instead laid off and told to find his own doctor. Appellant identified his handwritten statement describing the circumstances of his injury which he had prepared at the request of Employer on August 19th. In this statement appellant had specified that the day, date, and time of his injury was Tuesday, August 13th, at approximately 6:30 p.m. He contended that after writing that statement he realized he had erred and should have specified Wednesday, August 14th, at 3:30 p.m. as the day, date, and time of his injury. He said he

asked the Employer's representative, SB, to give him back his statement so he could make the corrections but that SB refused to do so. Appellant denied injuring his right shoulder while working on any of his two vehicles off the job during that week and he further denied that his wife had provided such an explanation for his injury to Employer. He felt that SC may not have become aware of his injury because they got off work shortly after the injury occurred.

Appellant's wife testified that appellant was injured on August 14th, came home hurting, and believed he had pulled a muscle in his right shoulder. She said that on the mornings of August 15th and 16th, before 7:30 a.m. when appellant's shifts were to begin, she called Employer, reached Employer's answering service, and left messages that appellant would not be coming in to work because his right shoulder was hurting. On Friday, August 16th, she went to Employer at around noon in order to pick up appellant's paycheck and had to wait until after 3:00 p.m. for the check to be released to her. She was given the check by LA, the job site superintendent, who had come from the job site. She said she inquired of LA as to what had happened to appellant at work and denied telling LA or any other of Employer's employees that appellant had hurt his shoulder while working on a vehicle. She said that both of the vehicles driven by her and appellant were working during that period and that appellant had not worked on either of them.

Appellant's medical evidence showed that on August 19th he was seen by Dr. P who diagnosed "sprain of shoulder and upper arm." His treatment plan was for appellant to return to work on restricted duty and return to the clinic in one week for "possibly a week of treatment." On August 22nd appellant was seen at (medical center) by Dr. G to whom he complained of right shoulder pain for one week and gave a history of injury while doing heavy lifting (five-gallon container of paint). Dr. G's diagnosis was shoulder strain and he provided appellant with an arm sling and medication. Appellant was again seen at the medical center on September 18th by Dr. C who referred him to Dr. PG. Dr. PG's report of September 19th recited the history provided by appellant that he injured his right shoulder on August 14th in the course of lifting five-gallon cans of paint to the top of a tank. This history went on to state that appellant said he had lifted several cans of paint when "he felt a pull to the right shoulder. He had the gradual onset of pain to shoulder and got progressively worse as the day went on." Dr. PG's impression was a possible rotator cuff injury and he recommended an MRI scan to rule out that possibility. According to Dr. PG, appellant was unable to return to work at that time. An x-ray report dated September 19th was negative. During the last week in December 1991, appellant received hot/cold packs, electrical stimulation, ultrasound, and massage treatments from Dr. P.

SB testified that he was the timekeeper for Employer in August 1991. He said that at around 8:00 a.m. on Friday, August 16th, appellant's wife called him and advised that appellant had hurt his shoulder when working on a truck at home. On Monday, August 19th, appellant came into SB's office with CM, his foreman, and told the foreman about his job injury on August 13th. SB then asked appellant to write a statement. Appellant wrote his statement concerning his injury in Barrera's presence and never asked for the statement

back to correct an erroneous day, date, and time of injury. SB stated that appellant's shift, which usually concluded at 4:00 p.m., did work until about 7:30 p.m. on August 13th, the date of injury appellant specified in his written statement, and concluded at about 4:00 p.m. the following day.

SC testified that he worked with appellant on the afternoon of August 14th carrying a five-gallon paint pot, that the pot never had more than two gallons of paint in it, and that they both carried the pot down the stairs. SC never saw any indication that appellant had hurt his shoulder nor did appellant say anything about his shoulder. He believed he would have noticed if appellant had hurt his shoulder. He never saw appellant use his right arm to dump the paint pot and he could not recall working with appellant on any other afternoon. They had to carry the paint pot up and down some stairs two or three times, the pot never contained more than a few gallons of paint, and the two of them always carried it together.

TA, Employer's office manager, testified that Employer's telephone message log revealed that no messages were left with Employer's answering service from appellant's wife on August 15th and 16th. On the latter date, when appellant's wife came to the office to retrieve appellant's paycheck, she told this witness that appellant had not come to work on August 15th and 16th because he had hurt himself working on the truck. TA called the superintendent, LA, to bring appellant's paycheck to the office from the job site. When he arrived with the check, he spoke to appellant's wife and asked why appellant had not called in. Mrs. C told him her husband had hurt himself working on his truck.

LA, Employer's field superintendent, testified that on Friday, August 16th, when he brought appellant's paycheck to the office, appellant's wife told him appellant had hurt his arm or shoulder working on his truck. When LA next saw appellant on Monday, August 19th, appellant recounted that he had hurt his arm carrying a paint pot down a ladder on Tuesday, August 13th. On Wednesday, August 21st, LA directed appellant to perform fire watch duty, which involved no physical activity, until he could be taken by the safety person back to the clinic as he had requested. Appellant would not perform such duty and his employment was later terminated. Respondent also introduced LA's written statement made on August 19th which recounted that appellant had said he hurt his shoulder Tuesday evening (August 13th) and that Mrs. C had told him on Friday, August 16th, that her husband had hurt his shoulder working on his truck.

As we noted above, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. (Article 8308-6.34(e)). Appellant objected to certain testimony from TA concerning information Employer obtained from its answering service relating to telephone messages from appellant's wife on August 15th and 16th. Appellant reasoned that he had requested the message records of the answering service for August 15th and 16th in an interrogatory and that respondent had not provided such records because the answering service destroyed its records after three months. TA produced Employer's own logbook of telephone messages and testified to Employer's procedures for checking with the answering

service each day for messages and recording same in Employer's logbook. Employer's logbook indicated that no telephone messages were received from appellant's wife on either August 15th or 16th. The hearing officer overruled appellant's objection, grounded on the hearsay and best evidence rules, because the information testified to by TA concerned and was based upon Employer's own procedures, which were matters within her knowledge, and Employer's logbook was produced by TA for appellant's inspection. In fact, appellant had no objection to respondent's admission of copies of the relevant pages from that logbook into evidence and even recited such telephone message information from that logbook into the record. It is not clear whether appellant has raised this issue for our review on appeal. However, we have considered the hearing officer's ruling on appellant's objection and do not find it erroneous. Article 8308-6.34(e) provides that "conformity to legal rules of evidence is not necessary."

The hearing officer determined that appellant failed to meet his burden of proof in establishing that he sustained a compensable injury under the 1989 Act. We do not substitute our judgment when, as here, the challenged findings are supported by some evidence of probative value. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The hearing officer's findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge